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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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CAUSE NO. PD-0967-17

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/22/2017
DEANA WILLIAMSON, CLERK

PETER ANTHONY TRAYLOR
APPELLANT/RESPONDENT

v.

THE STATE OF TEXAS
APPELLEE/PETITIONER

RESPONDENT'S REPLY TO THE STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Petitioner, Peter Anthony Traylor, Defendant in Cause No. 366-82274-2010, 366th Judicial District Court, Collin County, Texas and Appellant before the Court of Appeals for the Thirteenth District of Texas at Corpus Christi-Edinburg, in Cause No. 13-13-00371-CR, respectfully presents to this Honorable Court his Reply to the State's Petition for Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner does believe oral argument will aid this Court in the disposition of these cases.

NAMES OF PARTIES

Pursuant to Tex. R. App. P. Rule 68.4, the following is a complete list of the parties and persons interested in the outcome of this cause:

(A) **THE HONORABLE RAYMOND WHELESS**; 366th Judicial District Court of Collin County, Texas; Presiding Judge at Jury Trial; Collin County Courthouse, 2100 Bloomdale Road, Suite 30146, McKinney, Texas 75071;

(B) **PETER ANTHONY TRAYLOR**, the Appellant;

(C) **MARC J. FRATTER**, Counsel for Appellant on Appeal; the Law Office of Marc J. Fratter, 1207 West University Drive, Suite 101, McKinney, Texas 75069;

(D) **WILLIAM "BILL" SCHULTZ & JOSHUA ANDOR**, Counsels for Appellant at Trial; (Schultz) 1450 East McKinney, Denton, Texas 76209; (Andor) 2490 West White Avenue, McKinney, Texas 75071

(E) **THE STATE OF TEXAS**, by and through **GREG R. WILLIS**, Collin County District Attorney, and **PAUL ANFOSSO AND LINDSEY WYNNE**, Assistant Criminal District Attorneys and Counsels for Appellee at Trial, and **JOHN R. ROLATER**, Assistant

Criminal District Attorney (Chief of Appellate Section) and **ANDREA L. WESTERFELD**, Assistant Criminal District Attorney (***BOARD CERTIFIED IN CRIMINAL APPELLATE LAW BY THE TEXAS BOARD OF LEGAL SPECIALIZATION***) (Appellate Section); Collin County District Attorney, 2100 Bloomdale Road, Suite 100, McKinney, Texas 75071.

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STATEMENT OF THE CASE[1]

Appellant was arrested on September 14, 2010 for the offense of Burglary of a Habitation while Attempting to Commit Aggravated Assault or Committing Aggravated Assault, alleged to have occurred on or about the 9th day of July, 2010. (CR— 7, 19) On December 15, 2010 the Grand Jury of Collin County Texas returned a "True Bill" of Indictment against Appellant for the First Degree Felony offense of Burglary of a Habitation with Intent to Commit another Felony, specifically committing aggravated assault or attempting to commit aggravated assault. (CR—7-8, 19, 21)

Appellant elected for a Jury to determine guilt/innocence and the Court to assess punishment in the event of a "Guilty" verdict; but on December 13, 2012 the Court discharged the Jury after granting the request of the State to declare a mistrial. (CR— 11-15, 203, 204-213; RR1.4: 7-9) For Appellant's second Trial, Appellant again elected for a Jury to determine guilt/innocence and the Court to assess punishment in the event of a "Guilty" verdict. (CR—16-18, 238, 241) The Jury returned a verdict of "Guilty" beyond a reasonable doubt to the offense of Burglary of a Habitation while committing Aggravated Assault or Attempting to Commit Aggravated Assault, also finding beyond a

reasonable doubt that Appellant used or exhibited of a "deadly weapon" during the commission of the offense. (CR—16-18, 243-252, 254-259; RR2.5: 6-10) Following the punishment phase of the trial the Court sentenced Appellant to twenty (20) years in the Correctional Institutions Division of the Texas Department of Criminal Justice. (CR— 16-18, 254-260, 272-274; RR2.6— 187-190) On May 28, 2013 Appellant timely filed a ***Motion for New Trial*** and, on May 30, 2013, timely filed a ***Notice of Appeal***. (CR— 16-18, 261-264) Finally, on May 9, 2016, The Honorable Judge Ray Wheless, 366th Judicial District Court Judge Presiding, by written order appointed Marc J. Fratter to represent Appellant.

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[1] **Index of Abbreviations: CR- Clerk's Record in Cause Number 366-82774-2010; RR1.1- Volume 1 of Supplemental Reporter's Record containing Master Index of First Jury Trial proceedings commencing 12/10/12; RR1.2- Volume 2 of Supplemental Reporter's Record of First Jury Trial proceedings (12/10/12); RR1.3- Volume 3 of Supplemental Reporter's Record of First Jury Trial proceedings (12/11/12); RR1.4- Volume 4 of Supplemental Reporter's Record of First Jury Trial proceedings (12/12/12); RR1.5- Volume 5 of Supplemental Reporter's Record of First Jury Trial proceedings (12/13/12); RR2.1- Volume 1 of Reporter's Record containing Master Index of Second Jury Trial proceedings commencing 5/6/13; RR2.2- Volume 2 of Reporter's Record of Second Jury Trial proceedings (5/6/13-*Voir Dire*); RR2.3- Volume 3 of Reporter's Record of Second Jury Trial proceedings (5/7/13); RR2.4- Volume 4 of Reporter's Record of Second Jury Trial proceedings (5/8/13); RR2.5- Volume 5 of Reporter's Record of Second Jury Trial proceedings (5/9/13); RR2.6- Volume 6 of Reporter's Record of Second Jury Trial proceedings (5/14/13); RR2.7- Volume 7 of Reporter's Record of Second Jury Trial proceedings-State's Exhibits ("SE")#1-#27; Defense Exhibits ("DE")#1-#2; Note: State's Exhibits #1-#27 also admitted at First Jury Trial Proceedings commencing 12/10/12.**

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeals for the Thirteenth Judicial District of Texas at Corpus Christi-Edinburg held that, during Appellant's first trial the Jury rendered an informal verdict of acquittal on the charged offense, and it reversed his conviction upon retrial based on double jeopardy. *Traylor v. State*, No. 13-13-00371-CR, 2017 WL 2289026, at *1 (Tex.App.—Corpus Christi-Edinburg May 25, 2017). The State timely filed a motion for rehearing, to which the Court of Appeals ordered Appellant to file a timely response. After considering the State's motion for rehearing and Appellant's reply to the State's motion for rehearing, the Court of Appeals denied the State's motion. However, the Court of Appeals issued a new opinion on its own motion, again finding an informal verdict of acquittal on the charged offense but reforming the verdict to reflect a conviction on the lesser-included offense of second-degree burglary. *Traylor v. State*, __ S.W.3d __, No. 13-13-00371-CR, 2017 WL 3306357, at *1 (Tex.App.—Corpus Christi-Edinburg Aug. 3, 2017). The State timely filed its Petition for Discretionary Review. And, finally, Respondent timely filed his Reply to the State's Petition for Discretionary Review. Tex. R. App. P. 68.9.

STATEMENT OF FACTS

The Jury started to deliberate at 11:28 AM and, only thirty-seven (37) minutes later the Jury's First Note of Six Notes is received by the Court at 12:05 PM on December 12, 2012. (RR1.4: 53; CR: 214)

THE COURT: All right. Back on the record in State versus Peter Anthony Traylor. The Court has received a note from the jury, and the note says as follows: "Written police report, patrol officer, Officer Kennedy" signed by J. Sue Topping. And I assume what they want is a police report from Officer Kennedy. The response to the jury's note is as follows: To the members of the jury, I have received your note pertaining to a written police report, Patrol Officer Kennedy. Please be advised that all the evidence that has been admitted in this case in the form of reports or tangible evidence has been delivered for you for your review during deliberations. If the report you requested is not among those exhibits, then it is not in evidence and may not be provided to you.

Without any objection by the State or Appellant, the Court provided the above-written response to the Jury's First Note. (RR1.4: 54)

The Jury resumes deliberations at or around 12:11 PM on December 12, 2012 and, approximately two (2) hours and thirty-four (34) minutes later at

2:45 PM, the Trial Court receives the Jury's Second Note of Six Notes. (RR1.4: 55; CR: 215) The Jury's Note #2 read as follows: "Testimony Request of Mr. Fail: when word "allegedly" was used and description of where attack occurred in the corner; Definition of Evidence?" While the Court appears to have responded in writing to the Second Note of the Jury and without objection from the State of Appellant, the actual written response or what was contained in that written response is not part of the record. (RR1.4: 55)

The Jury resumes deliberations at or around 2:49 PM on December 12, 2012 and, approximately thirty-one (31) minutes later at or around 3:20 PM, the Trial Court receives simultaneously the Jury's Third Note and Fourth Note of Six Notes. (RR1.4: 56-64; CR: 216-217) The Jury's Note #3 read as follows: "There are definitions that appear in the "Charge of the Court" document P6 Paragraph 4 states "considering all the evidence". Question: (1) What is the court's definition of evidence as stated above? (2) based on court's definition, is testimony considered evidence?" Signed by J. Sue Topping. (CR: 216) The Jury's Note #4 read as follows: "Our previous request to hear testimony of Mr. Fail is due to a dispute among more than 2 jurors. Specifically testimony related to (1) use of the word allegedly by Mr. Fail and the question the attorney stated just prior to this word being stated: (2) Mr. Fail's description of

the scene in the corner of the dining room." Signed by J. Sue Topping. (CR: 217)

In response to the Jury's Third Note and Fourth Note the Jury is returned to the courtroom and, in the presence of the Judge, Counsel for State and Counsel for Appellant, and Appellant the Judge responds specifically to Jury Note #3 in the following way: "I am unable to answer that question, or those two questions, more definitively. But I would refer you to the Court's Charge, specifically on Page 7 of the Court' Charge, the paragraph that says, you are charged that it is only from the witness stand that the jury's permitted to receive evidence regarding the case. If you'll read the Court's Charge and continue your deliberations, all the answers that you need to know concerning the law is contained in the Court's Charge." (RR1.4: 63)

In response to the Jury's Note #4 the Court Reporter is asked to read back the portion of the testimony located in Volume 3, Page 52, Lines 15-23. (RR1.4: 64) The Trial Court requests the Jury to commence deliberations again and the Jury is reported to have resumed its deliberations at 3:33 PM on December 12, 2012. (RR1.4: 64) However, one (1) hour later at or around 4:35 PM, the Trial Court reports the Jury has made a telephone call reporting they are deadlocked. (RR1.4: 64) By this time the Jury has submitted four (4)

notes in writing, a dispute arose between at least two (2) jurors regarding very specific testimony related to the description of the scene of the offense which the Court Reporter read to the entire Jury in open Court, provided an oral report of being deadlocked via telephone, and only about four (4) hours and thirty (30) minutes had elapsed since deliberations had begun, including the one (1) hour the Jurors took a lunch-break. (RR1.4: 54-64)

The following represents the entire recorded proceedings from telephone call by a juror reporting the jury being deadlocked until the Court's granting of a mistrial, at the request of the State and over the objection of the Appellant and subsequent and immediate request by Appellant for the Court to deliver an *Allen* Charge.

THE COURT: Back on the record in State versus Peter Traylor. We've received a phone call from the jury that indicates that they're deadlocked. They've been deliberating about four-and-a-half hours now. State have a request.

THE STATE: Request that they continue to deliberate.

THE COURT: Mr. Schultz?

MR. SCHULTZ: We wish a mistrial. Let me ask you this. Do they have any indication of the numerical split?

THE COURT: I wasn't told that. Mr. Chacon, did they indicate to you what the number was?

THE BAILIFF: No, sir.

THE COURT: They just—was it the Presiding Juror that called you? You don't know who it was? He just received a phone call from the jury that just said they're deadlocked.

MR. SCHULTZ: Perhaps I was a bit premature in my request. I'd like to withdraw it before you rule.

THE COURT: Yes, sir, you may withdraw it.

MR. SCHULTZ: Yes.

MR. SCHULTZ: Do you propose just to tell them to continue and not anything else? Would that be what you would do?

THE COURT: Is either side requesting an Allen Charge?

THE STATE: I would like an Allen Charge, Judge.

THE COURT: Do you oppose that request??

MR. SCHULTZ: Only—only it doesn't seem like it's been quite that long for something that drastic. But, I mean, it—it doesn't matter. I think that's the only ever issue on a Dynamite Charge, is length of time they've been deliberating. It's been a short trial. I'll say that.

THE COURT: It has been, considering that we didn't start testimony until Tuesday morning. So we had two—one full day of testimony Tuesday. Today is Wednesday.

MR. SCHULTZ: Would you be willing to inquire of their numerical split? Without regard to which way, would you be—would you consider that?

THE COURT: Does that State oppose that request?

THE STATE: For the time being, I do, Judge.

THE COURT: Well, one alternative is to let—to end the day and have the jury come back in the morning and resume deliberations in Maybe a break in deliberations and going home for the evening and coming back in the morning might result in a verdict. We can—our options are to let them work a reasonable time. I was planning on letting them work until 6:00, but they've indicated that they're deadlocked.

The other option would be to discharge them, let them come back in the morning and resume deliberations to see if that would result in a verdict.

THE COURT: Do you have any objections to that, State?

THE STATE: No, Your Honor.

MR. SCHULTZ: I wish you'd work them, a little longer beforehand, before you do that—

THE COURT: All right.

MR. SCHULTZ: --and just have them continue. And I don't know that—I mean, if we're thinking—I guess I don't see the harm in requesting, tell me how your—your vote is, without telling me which way it is. I don't—I do not know that there's a hammer. That might—that might give us some information on—like, let's say it's 11 to 1.

THE COURT: Well, its going to give one side or another an upper hand in terms of what's requested after that. For example, if you know that it's close to not guilty, you'll want them to continue deliberating.

MR. SCHULTZ: I don't want to ask them which way you're voting, not guilty or guilty. I'm not suggesting that. I'd just like to know, are we fighting an 11 to 1, or is it 6-6, or 5, 5—

THE COURT: Do you oppose that request?

THE STATE: Judge, that's fine.

THE COURT: All right. I'll send them a note and ask, without divulging the guilt or innocence, to tell me the numerical number of the jurors' votes, okay?

THE COURT: Well, we have a problem because they have to include the lesser included, so they're—right now, we're assuming that we're talking about just the first question, whether he's guilty or not of the aggravated assault.

MR. SCHULTZ: You're right.

THE COURT: And we don't know which of those two questions they may—I mean, there are two different issues that they'd have to answer. They'd have to tell us if they've moved on past the first question and they're hung up on the second question, or if they're hung up on the second question.

MR. SCHULTZ: You're right.

THE COURT: So how do we poll them about that? You want to ask them specifically which question that they're stuck on and what the numerical value of the vote is for that question?

MR. SCHULTZ: I'm not suggesting that kind of invasion, really. I don't know.

THE COURT: All right. Well, let's just let them answer generally, then what their vote is.

THE COURT: All right. I've entitled this, Court's Inquiry. Members of the Jury, the Court has been advised that the jury is deadlocked in its deliberations. Without indicating whether your vote is guilty or not guilty, please indicate, in the

spaces provided below, the number of jurors voting one way or the other on the guilt or innocence questions. And I have blank, and then I have a slash and then another blank next to it. Would that—is the State opposed to that?

THE STATE: No, it's fine, Judge.

THE COURT: Are you opposed to that?

MR. SCHULTZ: No, sir.

THE COURT: Does that comply with you request. All right. Thank you.

(4:49 resume deliberations) (Jury note at 5:01)

THE COURT: Well, back on the record in State versus Peter Traylor. Contrary to the Court's specific instructions to the jury, the jury has indicated the number of people voting guilty and the number of people voting not guilty on both the primary charge and the lesser included charge. So the Court and the Bailiff, if he reviewed the note, are both aware of the jury's vote at this time on those issues. So does either side wish to know where the vote is at this time? Is the State requesting that information?
(CR—218; Jury Response to Court's Inquiry)

THE STATE: No, Judge.

THE COURT: All right, Mr. Schultz, are you requesting that information?

MR. SCHULTZ: Well, it's awkward. Sure, I'm interested in—in what they've got to say.

THE COURT: All right. Well, I requested the information specif9ically about the number for and the number against. And so they're on the lesser included offense, and the vote is 5-7. That's where we are.

MR. SCHULTZ: The vote is—

THE COURT: 5 to 7. I'm—you requested—both sides requested not to know whether it was for guilty or innocent. And so they're on the lesser included offense, and the vote currently stands at 5 to 7. So the Court's going to instruct the jury to continue their deliberations. Are you still requesting the Allen Charge, State? It's 5:00 now. The jury's been deliberating since about noon, so they've been deliberating for about five hours, excluding the time they went to lunch.

THE STATE: No, Judge.

THE COURT: All right. Mr. Schultz?

MR. SCHULTZ: No, sir.

THE COURT: All right.

MR. SCHULTZ: Certainly not at this time. Something may change the next time we visit that issue.

THE COURT: Would the State be opposed to advising the jury, the Court is requesting that they continue their deliberations until 6:00 PM today, and if they're unable to reach a verdict, that we'll come back in the morning?

THE STATE: I'm fine with that, Judge.

MR. SCHULTZ: That's okay.

THE COURT: All right.

(Jury resumes deliberations at 5:05)

THE COURT: The supplemental instruction says, Members of the Jury, the Court has been advised that the jury is deadlocked in its deliberations. Please continue your deliberations until 6:00 PM today. If you are unable to reach a verdict by that time, the jury will return at 9:00 AM tomorrow to resume deliberations. Any objection?

MR. SCHULTZ: No, sir. That's better than an Allen Charge, if you ask me.

THE COURT: All right. You can take—well , they were in here when I discussed it, so you can go ahead and take it back.
(Resume deliberations)

THE COURT: Let's bring the panel in, please.

THE BAILIFF: All rise.

(Jury seated.)

THE COURT: You may be seated, ladies and gentlemen. Ladies and gentlemen, I know you've been working very diligently on this case. You've been back there for a long time considering all the evidence very carefully. Your notes and your communication with the Court indicate that your're really reviewing this case as you should be. It's now a little bit after 6:00. We're going to go ahead and break for the evening and have you come back at 9:00 AM…Tomorrow morning, when you come back at 9:00 AM, you go straight back in the jury room. When you're all there, then you can resume your deliberations. So you are excused, We'll see you back tomorrow morning at 9:00 AM. We'll be in recess until then. (RR1.4—64-74)

The "***Court's Inquiry Concerning the Jury's Vote***" was the response to the telephone call by the anonymous juror reporting the Jury was deadlocked.

(CR: 218) To be clear, and what was in direct contradiction to what the Court requested, the Court, Counsel for State and Counsel for Appellant were apprised of three things (explicitly and implicityly): (1) All twelve (12) juror had decided Appellant was "Not Guilty" of the offense as Charged in the Indictment—Appellant had been acquitted of the offense of Burglary of a Habitation while Attempting to Commit or Committing Aggravated Assault; (2) All twelve (12) jurors did not believe the allegation regarding the use/exhibition of a "deadly weapon"; and (3) Five (5) jurors believed Appellant was "Guilty" of the lesser-included charge, while seven (7) jurors believed Appellant was even "Not Guilty" of the lesser-included charge. (CR: 218)

The following day the Jury re-commenced deliberations at 9:00 AM. (RR1.5—4) At 11:30 AM, the Court received the sixth (6) and final note from the Jury. In part, Note #6 stated: "*Judge, The Jurors are at an impasse with 2 Jurors for "not guilty" and 2 Jurors for "guilty" who have stated they <u>will not</u> (underline in original) change their position.…The vote overall at this time is: 8 "Not Guilty" and 4 "Guilty*."""

The following is the final exchange between the Court, Counsel for State, Counsels for Appellant at Trial, and the Jury:

MR. SCHULTZ: How is the Court inclined to deal with this, Judge?

THE COURT: Grant a mistrial, come back and start all over another day and another time.

MR. SCHULTZ: When we go on the record, we'll probably be objecting to the mistrial and requesting a dynamite charge.

THE COURT: Okay. Go ahead and bring the jury in, please.

THE COURT: All right. Ladies and gentlemen of the jury, I know you've been working very hard on this case, and I've worked you a lot longer and harder than probably you thought I should have. But I was hoping that you could reach a verdict. I understand this is a difficult case. The issues in this case have not been easy. I received your note last night indicating that the jury did not believe that Mr. Traylor was guilty of the main charge of the offense, but that there was disagreement amongst jurors in the lesser included offense and that you were hung up on that issue and that the vote apparently changed by only one juror from last night into today, even after deliberating for almost three hours today. So the note that I received, Ms. Topping—excuse me—is that the jury is hopelessly deadlocked; is that correct?

PRES. JUROR: I used the word impasse, but I suppose deadlock is probably the legal term. But we are at a point where we have 4 stated emphatically that they won't change their position.

THE COURT: All right. Thank you. Does the State have a request at this time?

THE STATE: Judge, I think that, based on the nature of the notes and length of time in deliberation, that the Court should declare this a mistrial and reset it to the jury trial docket.

THE COURT: All right. Thank you. Mr. Andor?

MR. ANDOR: Yes, Judge. I'm sure the Court will remember what I said previously, before the Jury came back in. While we thank the jury for their service, we'd ask them to try just a little bit longer, because they've heard all the evidence. So we object to the mistrial and ask for a Dynamite Charge.

THE COURT: All right. Thank you. The requested Allen Charge is overruled and denied. The testimony if this case consisted of one day essentially, and the jury's been deliberating for about eight hours, almost as much time deliberating as time they spent hearing the evidence in this case. Based on the jury's statement that they don't believe that further deliberations would result in a verdict in this case, the Court declares a mistrial, and we will have to come back to try this case again on another date. (RR1.5—4-8)

REPLY TO STATE'S QUESTIONS FOR REVIEW

STANDARD OF REVIEW, AUTHORITIES AND ARGUMENT

The facts relevant to this issue are set out in the Statement of Facts and are incorporated herein.

Applicable Law and Standard of Review/Double Jeopardy

When Texas Appellate Courts decide cases involving the United States constitution, the Texas Appellate Courts are bound by the United States Supreme Court case law interpreting it. *See, e.g.., Samudio v. State,* 648 S.W.2d 312, 314 (Tex.Crim.App.1983). If the Texas case law is in conflict, Texas Appellate Courts are obligated to follow United States Supreme Court

federal constitutional precedents. *See* United States Constitution, Article VI. The Texas Court of Criminal Appeals has recognized that where one of its decisions on a federal constitutional issue directly conflicts with a United States Supreme Court holding, Texas Courts of Appeal and the Texas Court of Criminal Appeals are bound to overrule its decision(s). *Samudio* at 314; *State v. Guzman*, 959 S.W.2d 631 (Tex.Crim.App.1998).

The Double Jeopardy Clause commands that "No person shall be subject for the same offense to be twice put in jeopardy of life or limb." See U.S. CONST.AMEND. V. The Clause prohibits the State from repeatedly attempting to convict a Defendant of an offense, thereby "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Blueford v.* Arkansas, 566 U.S. 599, 132 S.Ct. 2044, 2050, 182 L.Ed.2d 937 (2012). The Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); U.S. CONST. amend. V; TEX. CONST. art. 1, § 14. To permit a second trial following an acquittal would grant to the State what the clause forbids: the proverbial "second bite at the apple." *Burks v. United States*, 437 U.S. 1, 10, 98

S.Ct. 2141, 57 L.Ed.2d 1 (1978) (recognizing that the double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first trial).

To implement this rule, the Supreme Court has articulated two principles. First, an acquittal occurs if a jury's decision, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) To help ascertain whether an acquittal has occurred, the form of the fact-finder's resolution "is not to be exalted over [its] substance"; at the same time, however, the form of the fact-finder's resolution cannot be "entirely ignored." *Sanabria v. United States*, 437 U.S. 54, 66, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Rather, the Court asks whether the fact-finder has made "a substantive determination that the prosecution has failed to carry its burden." *Smith v. Massachusetts*, 543 U.S. 462, 468 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005). Jurisdictions have different procedures respecting the announcement of verdicts and the entry of judgments, but that diversity has no constitutional significance. Jeopardy terminates upon a determination, however characterized, that the "evidence is insufficient" to prove a defendant's "factual guilt." *Smalis v. Pennsylvania*, 476 U.S. 140, 144,

106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Thus, the Court has treated as acquittals a trial judge's directed verdict of not guilty, *Smith*, 543 U.S., at 468, 125 S.Ct. 1129; an appellate reversal of conviction for insufficiency of the evidence, *Burks*, 437 U.S. at 10, 98 S.Ct. 2141; and, most pertinent here, a jury' announcement of a not guilty verdict that was "not followed by any judgment," *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Second, a trial judge may not defeat a defendant's entitlement to "the verdict of a tribunal he might believe to be favorably disposed to his fate" by declaring a mistrial before deliberations end, absent a defendant's consent or a "'manifest necessity'" to do so. *United States v. Jorn*, 400 U.S. 470, 486, 481, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)(plurality opinion).

Texas law clearly recognizes the existence of an informal verdict of acquittal.[1] *See* TEX. CODE CRIM. PROC. ANN. arts. 37.01 & 37.10 (a) (West, Westlaw through 2015 R.S.). Article 37.01 provides: "Verdict" is defined as a "written declaration by a jury of its decision of the issue submitted to it in the case." Article 37.10(a) provides that a trial court "shall" render judgment in accord with the jury's verdict if the verdict is informal and it "manifestly appear[s]" that the jury intended to acquit the Defendant.

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[2] Here, the Trial Judge instructed the **Traylor** jury to consider the offenses in order, from the charged offense of first-degree felony Burglary to the second-degree felony Burglary, specifically: "*Now, if you find from the evidence beyond a reasonable doubt that on or about the 9th day of July, 2010, in Collin County, Texas, the Defendant, Peter Anthony Traylor, did then and there intentionally or knowingly, enter a habitation, without the effective consent of Alicia Carter, the owner thereof, and attempted to commit or committed an aggravated assault against Alicia Carter, then you will find the Defendant guilty as charged in the indictment. Unless you find from the evidence beyond a reasonable doubt, of if you have a reasonable doubt that the Defendant is guilty of Burglary of a Habitation and Attempting to or Committing Aggravated Assault as Charged, or if you cannot agree, you will next consider whether he is guilty of the lesser-included offense of Burglary of a Habitation and Attempting to or Committing Assault as instructed below."* (CR: 206-207) Moreover, the State's closing arguments repeated this same directive: "*Now, you have sort of a stair-step of charges that you could possibly consider in this case…Now, the first Charge then on you verdict form, did he commit burglary of a habitation...commit or attempt to commit aggravated assault…[t]hat's the first thing. The second thing to consider,* ***if you can't agree on that beyond a reasonable doubt unanimously****, is to go to the next Charge...a lesser included charge of burglary...attempting to or committing…assault.* (RR1.4: 26-27)

Discussion

Why *Traylor* is unlike *Blueford* to the extent that where the United States Supreme Court determined the jury foreperson's report "lacked the finality necessary" to amount to an acquittal for double jeopardy purposes in *Blueford*, it would and ought not to find the same in *Traylor*.

1. Five hours of deliberation and four (4) notes before the *Traylor* jury reported orally and in writing it was deadlocked.

2. Despite the specific written instructions of the Trial Judge to NOT indicate whether the vote is guilty or not guilty, the *Traylor* jury reported to what extent and on what Charge is was deadlocked: 5 Guilty/ 7 Innocence on the Lesser-Included Charge.

3. Despite the specific written instruction of the Trial Judge to indicate the number of jurors voting one way or the other on the guilt/innocence questions without indicating whether the vote was guilty or not guilty as it applied to the jury being deadlocked in its deliberations, the *Traylor* jury elected to reveal the unanimous verdict of all twelve (12) jurors as it pertained to the offense as charged in the Indictment, the charge on which it was NOT deadlocked at all.

4. The Trial Court Judge ordered the *Traylor* Jury to deliberate for an additional hour and, if the Jury remained deadlocked on the lesser-included charge, the Jury would be required to re-appear the next morning at 9:00 AM.

5. The *Traylor* Jury re-appeared the next morning and continued deliberations for nearly three (3) more hours. At this time the Trial Court Judge acknowledged to the Jury Foreperson that while the Court recognized the Jury continued to believe the Defendant was not guilty of the offense as charged in the Indictment (first-degree felony burglary) it appeared the vote of 7 not guilty/5 guilty had changed to 8 not guilty/4 guilty in that nearly three (3) hourly period, to which the Jury Foreperson confirmed.

6. After five (5) hours of deliberation which included the following initial statement written by the Jury Foreperson—"Charged in the Indictment-12 Not Guilty"—to be later confirmed after four (4) more hours of deliberation by the words of the Jury Foreperson to continue to be 12 Not Guilty for Offense as charged in the Indictment, but 8 Not Guilty/4 Guilty for the Lesser-Included Offense.

7 Unlike in *Blueford*, the Jury Foreperson's final written and oral report to the Trial Court Judge contained the "finality necessary" to satisfy the protection of the Double Jeopardy Clause as it pertained to the first-degree

felony Burglary charge.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays this court REFUSE the ***State's Petition for Discretionary Review***.

Respectfully Submitted,

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2017 a true copy of the foregoing ***Reply to the State's Petition for Discretionary Review*** has been served on the District Attorney of Collin County by electronic delivery and on the State of Texas, Prosecuting Attorney, Stacey Soule, at 209 West 14th Street, P.O. Box 13046, Capitol Station, Austin, Texas 78711, by United States certified priority mail, return receipt requested.

/s/ Marc Joseph Fratter
Marc J. Fratter

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 9.4(i)(3) and 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure the undersigned counsel certifies that the total word count of the *Respondent's Reply to State's Petition for Discretionary Review* filed in the above-referenced cause according to the Microsoft Word program is 1,989, exclusive of the sections of the Reply exempted by Rule 9.4(i)(1).

/s/Marc Joseph Fratter
Marc J. Fratter